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No. 743

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IN THE

Supreme Court of the United States

October Term, 1965

INDIANA BROADCASTING CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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The Commissioner's "Memorandum in Opposition" tries to give the impression that this is just another factual tax case. It is not that at all. The issues which the petition for certiorari tenders for decision by this Court, briefly re-stated, are:

(1) Whether depreciation deductions for the cost of a valuable business contract with a fixed initial term must be disallowed where there is a substantial but

statistically measurable probability of its renewal for additional terms. This general issue of depreciability of a type of intangible asset turns in part on the question whether depreciation must be denied because the intangible assets here at issue—television network affiliation contracts—have as one of their life expectancy characteristics the fact that individual contracts do not decline in value prior to termination solely because of use or the passage of time.

(2) Whether the Court of Appeals applied improper standards for appellate review of a Tax Court decision—which had been submitted to the entire body of judges of that specialized tribunal and approved without dissent—in that the Court of Appeals (a) overrode carefully formulated findings of the trial court on key evidentiary issues and (b) disregarded the Tax Court's extensive analysis of the governing Treasury Regulation directing use of "the general experience in the industry."

Since the Memorandum in Opposition seeks to avoid these issues, a brief reply to the points made in the Memorandum is necessary.

1. The present case is perhaps the first one squarely to pose the issue whether the cost of a business contract with a fixed initial term—indisputably depreciable if the probability of its renewal is insubstantial—somehow loses its depreciable character where there is a substantial but statistically measurable probability of renewal. That issue is here presented on a record containing evidence found by the trial court to constitute a reasonably accurate basis for

measuring the probability of renewal (see especially Pet., pp. 49a-53a).*

The Commissioner's Memorandum proceeds on the assumption that the allowance for depreciation "is *confined* to property which *gradually* approaches a point where its usefulness is exhausted" (p. 3; emphasis added). However, the correctness of this supposed limitation upon the allowance for depreciation is one of the principal issues to be decided in this case. The Commissioner has cited two prior cases in which this theory appears in the form of dictum (*United States* v. *Ludey*, 274 U. S. 295; *Detroit Edison Co.* v. *Commissioner*, 319 U. S. 98). These cases, however, did not deal with assets having the particular life expectancy characteristics of network affiliation contracts and similar intangible assets. Nor do the Code and Regulations deal explicitly with this issue.

The taxpayer's position is that, where it is possible to construct a reasonably reliable life expectancy table from which an average life of such contracts can be forecast, the fact that individual contracts do not decline in value prior to termination solely because of use or the passage of time does not bar depreciation (see Pet., pp. 14-20). In the present case, a unanimous Tax Court held that an average life of 20 years had been established with reasonable accuracy (see Pet., p. 53a).

2. The Memorandum also (pp. 4-7) attacks—on the basis of various evidentiary details cited by the Court of

* The case of a single valuable contract acquired for a business is, as the Tax Court specifically held, totally unlike the case of the "mass of contracts" or customer relationships which constitute goodwill (see Pet., p. 42a). The single valuable contract is similarly distinguishable from capital stock, which represents the value of the entire mass of assets of a business. *Cf.* Commissioner's Memorandum, p. 3.

Appeals in making its own appraisal of the evidence—the reliability of the statistical evidence which the Tax Court found to be acceptable for depreciation purposes. But this very re-assessment of the weight to be accorded specific items of evidence in a record consisting basically of conflicting expert testimony, as well as highly technical exhibits, so far departed from the accepted and usual course of appellate proceedings as to be in itself a basis for the petition for certiorari (see Pet., pp. 21-30).

A related question of propriety is presented by the Court of Appeals' total disregard of the Tax Court's extensive analysis, against which its factual findings were made, of the Treasury Regulation directing reference to "the general experience in the industry" where a taxpayer's own "experience with similar property" is inadequate (see Pet., pp. 1a-2a, 45a-46a, 49a-50a, 53a).

The Commissioner's Memorandum now seeks to justify this disregard of the Regulation by suggesting that in this case "the factors which influence the length of the useful life" of the contracts constituting the industry experience are not "present in substantially the same degree" in the contracts of the taxpayer's two stations (p. 7). Here the Memorandum, by mere assertion, seeks to turn aside the careful analysis of the Code and Regulations and of the facts in this record made by the Tax Court, which concluded that the taxpayer's two contracts were sufficiently similar to those reflected in the industry experience to permit the basing of an allowance for depreciation upon the statistically derived life expectancy and average life (see Pet., pp. 31-35; 46a-53a).

3. The Memorandum illustrates the influence on the Commissioner's position of the unarticulated premise to which we referred in the petition (pp. 34-35). This premise is the Commissioner's view that, although the Code provision for depreciation and the Regulation regarding industry experience by their terms apply to tangible and intangible assets alike, they should be interpreted to bar the use of industry experience to forecast the average life of intangible assets. This issue underlies the entire petition for certiorari, and it cannot be resolved without guidance from this Court. Sound and fair administration of the tax law requires that the cost of a substantial intangible asset be recoverable during a period of productive years, representing forecast estimated useful life, if there is a rational and practical means for making the forecast—as the Tax Court found there was in this case.*

For the foregoing reasons, and those more fully set forth in the petition, certiorari should be granted.

Respectfully submitted,

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* The brief *amicus curiae* of the National Association of Broadcasters re-emphasizes the importance of resolution of the depreciation treatment of intangibles, not only for the numerous television station owners faced with litigation identical to the present case, but also for the many other businesses throughout the economy whose income-producing capacity is dependent to a significant degree upon a single valuable business contract or other intangible assets (see also Pet., p. 15 n. 13 and 14).